IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-269, 72-270, 72-271

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Appellants,

vs.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,

Appellees;

EARL W. BRYDGES, as Majority Leader and President pro tem of the New York State Senate,

Appellant,

vs.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,

Appellees;

CATHEDRAL ACADEMY *et al.*,

Appellants,

vs.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Filed August 18, 1972
Probable Jurisdiction Noted November 6, 1972

BRIEF ON BEHALF OF APPELLANT, EARL W. BRYDGES

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Appellant, Senator Earl W. Brydges, as Majority Leader and President Pro Tem of the New York State Senate, submits this brief on his appeal from the judgment of the United States District Court for the Southern District of New York, entered on June 1, 1972, which permanently enjoins payments under a 1970 law of New York State to nonpublic schools.

Opinion Below

The opinion of the District Court for the Southern District of New York, on the motion to convene a three-judge District Court, is reported in 322 F. Supp. 678 (S. D. N. Y. 1971).

The majority opinion of the District Court (342 F. Supp. 439) enjoining payments under the 1970 law of New York State and the dissenting opinion thereto (342 F. Supp. 445) are reported in 342 F. Supp. 439 (S. D. N. Y. 1972).

Jurisdiction

The judgment of the District Court enjoining payment of funds of the State of New York to nonpublic schools to reimburse them for a portion of expenses for complying with State-mandated attendance, reporting and educational requirements was entered on June 1, 1972 (See App. 94a). On August 18, 1972, Appellant, Senator Earl W. Brydges, filed his Jurisdictional Statement in this Court. On November 6, 1972, this Court noted probable jurisdiction. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Questions Presented

1. Is there a violation of the First Amendment provisions of the U. S. Constitution, with respect to "Separation of Church and State", when a state statute grants limited state funds to nonpublic schools to alleviate part of the additional financial burden imposed on them by their compliance with certain state educational requirements mandating inspection and record-keeping and the examination of students attending nonpublic schools?

2. Does the "Establishment Clause" of the First Amendment of the U. S. Constitution, with respect to prohibiting laws establishing religion, stifle the will of democratic institutions to provide minimal assistance to nonpublic schools of a secular, nonideological and neutral nature?

3. Is there a violation of the First Amendment provisions of the U. S. Constitution, with respect to Freedom of Speech, and of Articles IX and X of the U. S. Constitution, with respect to the sovereignty of the individual and the several states, when the federal judiciary curtails the right of legislative bodies and political institutions to a free and open debate of issues of a peculiarly volatile nature?

Statute Involved

Chapter 138 of the 1970 Laws of the State of New York, entitled "An Act to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor" (See App. 93a).

Statement

Appellant, Senator Earl W. Brydges is the Majority Leader and President Pro Tem of the New York State Senate.

Appellants, Levitt and Nyquist are, respectively, Comptroller and Commissioner of Education of the State of New York. Appellants, Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls and Yeshivah Rambam are nonpublic elementary and/or secondary schools situated in the State of New York.

Appellees, allegedly taxpayers of New York State, instituted this suit on July 30, 1970 in the United States District Court for the Southern District of New York, praying, *inter alia,* that appellants Levitt and Nyquist be permanently enjoined from approving or paying any funds of the State of New York pursuant to Chapter 138 of the 1970 Laws of New York (See App. 93a), hereinafter referred to as "Mandated Services Act", to schools owned or controlled by religious bodies or organized or engaged in the practice or teaching of religion or which limit or give preference in admission or employment to persons of a particular religious faith. Appellants, Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls and Yeshivah Rambam, as beneficiaries under the Mandated Services Act, duly intervened in the suit as parties defendant pursuant to Rule 24 of the Federal Rules of Civil Procedure (FRCivP). A three-judge District Court consisting of the Hon. Paul R. Hays, U. S. Circuit Judge, Hon. Edmund L. Palmieri and Hon. Morris E, Lasker, U. S. District Judges, was duly constituted on February 24, 1971 pursuant to 28 U.S.C. §§2281, 2284. A hearing on the merits was held on April 11, 1972.

On April 27, 1972, Judge Lasker handed down an opinion (342 F. Supp. 439), concurred in by Judge Hays, that the Mandated Services Act "violates the establishment clause of the First Amendment." The Court reasoned in part, as follows:

> "Either the statute falls because a system of surveillance and control would create excessive entanglement, or, without such a system, the schools would be free to use funds for religious purposes. The constitution is breached whichever route is chosen."

Judge Palmieri dissented (342 F. Supp. 445) on the ground, among others, that

> "[t]he record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such purposes. This provides adequate assurance that government funds are not available for examination functions peculiar to religious institutions."

On June 1, 1972, judgment was entered (See App. 94a) permanently enjoining the

> "defendants and their agents and all persons acting for or on behalf of the State of New York . . . from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools."

Appellant, Senator Earl W. Brydges was permitted to intervene as a party defendant in this suit pursuant to Rule 24, FR Civ P, subsequent to entry of judgment (App. 113a).

Summary of Argument

Allocation of public funds to reimburse nonpublic schools for a portion of expenses for complying with State-mandated attendance and reporting requirements and

for evaluation of student performance are clearly within the meaning of "secular, neutral and nonideoligical" aid, which this Court has recognized as constitutional. The record below is uncontested that the public aid appropriated for such expenses is less than the schools expend for complying with New York State educational requirements, thus assuring that the public funds are not available for religious purposes. The original purpose for enactment of this legislation was to assure, through examination and inspection, that children are attending nonpublic schools and maintaining levels of achievement in accordance with the long-standing tradition of the State's education laws. This legislation, moreover, has taken on the added dimension of being essential to avert a fiscal crisis in nonpublic schools because of staggering increases in educational costs in the last few years. Any precipitous closings of financially hardpressed nonpublic schools would result in catastrophic consequences to the already overcrowded public schools and the State's financing of other governmental services. State legislatures should not be foreclosed from enacting programs of nonpublic school aid, though such legislative action might engender some "political divisiveness."

ARGUMENT I

The mandated services aid to nonpublic schools is "secular, neutral and nonideological".

A. Summary of Provisions of the New York State "Mandated Services Act"

Chapter 138 of the 1970 New York State Law, the "Mandated Services Act", authorizes $28,000,000[1] to be

[1] Declining enrollment has reduced the actual payments to $24 million, or less, annually.

paid to nonpublic schools as partial reimbursement for expenses incurred for services mandated or necessarily required by state law or regulation of the State Commissioner of Education. These services[1] are intended . . . "to assure, through examination and inspection and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities."[2] Minimum state educational standards have been required of public and nonpublic schools alike in New York State for over a century.[3]

B. The "Mandated Services Act" Satisfies the Constitutional Standards of the First Amendment

1. *The First Amendment Requires That Any Public Aid Program For Nonpublic Schools Maintain "Official Neutrality" Between Church and State.*

The constitutional standards that any program of nonpublic school aid must satisfy are stated most succinctly in the decision of this Court of June 28, 1971 in *Lemon* v.

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[1] ". . . examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations; maintenance of records of pupil enrollment and reporting thereon; maintenance of pupil health records; recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation" (§2, Chapter 138 of the Laws of 1970).

[2] Section 1, Id., legislative findings.

[3] See, N. Y. Consolidated School Law, Chap. 555, Laws of 1864.

Kurtzman; Earley v. *Di Censo* and *Robinson* v. *Di Censo,* 403 U. S. 602 (1971). The standards are stated in terms of three "cumulative criteria": First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion [citing the textbook case of *Board of Education* v. *Allen,* 392 U. S. 236 (1968)]; finally the statute must not foster 'an excessive government entanglement with religion' [citing the tax exemption case of *Walz* v. *Tax Commission,* 397 U. S. 690 (1970)]."

The June 28, 1971 Opinions of this Court do not contain—indeed they disavow—any neat formula for determining the line of unconstitutionality of this area of public aid to church-related education. Conclusions must be based, therefore, on this Court's analysis of nonpublic school and religious aid programs in prior opinions, the language and spirit of those opinions, and the explanations given of related precedents.

Despite the formidable task and the divergent views entailed in such an anlaysis, it is significant that this Court over the past quarter century has sustained rather consistently public aid to relieve the financial burden on religious institutions, which could not otherwise survive without such aid. Such aid has taken the form of transportation aid (*Everson* v. *Board of Education,* supra), and textbook aid (*Board of Education* v. *Allen,* supra), both of which assist the nonpublic schools in fulfilling their avowed religious mission. Financial relief for religious institutions has also been recognized as a legitimate public function in the form of tax exemptions for church-owned property (*Walz* v. *Tax Commission,* supra).

In contrast to this framework of constitutional aid programs, this Court has rejected programs which involve public assistance for the actual "instruction" of students.

Unconstitutional are programs for reimbursement of teachers' salaries for "secular educational services" (*Lemon* v. *Kurtzman*, supra). Also, programs of primarily an ideological nature to advance religious teaching in public schools, such as released-time religious education in the public schools (*McCallum* v. *Board of Education*, 333 U. S. 203 (1948)), or the recitation of school prayers in public schools (*Engel* v. *Vitale*, 370 U. S. 421 (1962)) and even the daily reading from the Bible, without comment or prayer. (*Abington* v. *Schempp*, 374 U. S. 203 (1963)).

The foregoing analysis of this Court's decisions reflects certain basic policies in the religion clauses of the Constitution. Financial aid to religious institutions is not, per se, an abridgement of the Separation of Church & State Doctrine of the First Amendment of the Constitution. Rather, the abridgement occurs when any government program impairs an individual's right to voluntarily exercise his religious beliefs or if the State acts to advance a particular religious belief.

The basic principle, therefore, which the religious clause of the First Amendment is intended to protect, may be succinctly stated as "official neutrality"—avoidance of undue involvement of the churches in the state and of the state in the churches. As was observed by Justice Harlan, concurring in *Walz* v. *Tax Commission*, supra at 694:

> ". . . I think it relevant to face up to the fact that it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application. What is at stake as a matter of policy is preventing that kind and degree of government

> involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point. Two requirements frequently articulated and applied in our cases for achieving this goal are 'neutrality' and 'voluntarism' [citing Goldberg, J., in the *Schempp* case, supra at 305 and *Engel* v. *Vitale, supra.*] These related and mutually reinforcing concepts are short-form for saying that the Government must neither legislate to accord benefits that favor religion over nonreligion, nor try to encourage participation in or abnegation of religion."

As gleaned from the above authorities, these two concepts, which are at the core of the Religion Clauses, must be observed by political institutions so as to avoid the . . . "risk of politicizing religion" (*Walz* v. *Tax Commission, supra,* opinion J. Harlan, at 695.); or in other words, "excessive entanglement" between Religion and the State.

To be sure, the concepts "neutrality", "voluntarism" and "excessive entanglement" are like a prism, through which an object may take on different appearances depending on how the prism is held to the eye of the observer. It is submitted, however, that when viewed in proper perspective, these concepts require that a nonpublic school aid program, to pass constitutional muster, should insure that the State maintains "official neutrality" from the religious sector.

When analyzed in the light of this framework of Constitutional authority, New York State's Mandated Services Act of 1970 satisfies this Court's concern for "official neutrality".[1]

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[1] Plainly, this expression is employed, not to suggest that this Court should fashion any new test of constitutionality, but to highlight important aspects of the "purpose," "effect" and "entanglement" tests.

2. *"Official Neutrality" Is Implicit In The Historical Background Of The Mandated Services Act.*

(a) The Nature of Mandated Services—

For more than a century the nonpublic schools in New York State have been required by law to comply with certain minimum educational and health standards, record keeping and enrollment procedures. These requirements have been imposed consistently on all elementary and secondary schools, both public and nonpublic alike, by various sections of the Education Law. For example, the provisions of Article 17 of the Education Law require certain subjects to be taught in nonpupblic as well as public schools;[1] and most notably the provisions of Sections 3204 and 3210 thereof, which require that the educational offerings of nonpublic schools must be "at least substantially equivalent" to that of the public schools of the district of location of the nonpublic school and of the district of residence of the student.[2] Furthermore, subdivision 2 of Sec-

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[1] The provisions of this Article, many of which predate the Twentieth Century, require all elementary and secondary schools of the state to instruct in such subjects as patriotism, citizenship, historic documents, the flag, holidays, physical education, alcohol, drugs, highway, traffic and fire safety, humane treatment of animals, firearms and wildlife.

[2] See, "N. Y. Education Law, §3204. Instruction required", which provides in part—"1. Place of instruction. A minor required to attend upon instruction by the provisions of part one of this Article may attend at a public school or elsewhere. The requirements of this section shall apply to such a minor, irrespective of the place of instruction.

"2. Quality and language of instruction; text-books. * * *

Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the in-

(Footnote continued on following page)

tion 305 of the Education Law, which provides for the general powers and duties of the Commissioner of Education, states that he shall have general supervision over all schools and institutions which are subject to the provisions of the Education Law or any other statute relating to education and that he must cause all these schools to be examined and inspected.[1]

For the purpose of controlling the educational quality of the State education system, various measuring devices are used by the State Education Department, such as the Regents examinations, the so called "PEP Tests" (Pupil Evaluation Program) in grades 3, 6, and 9, as well as other testing devices, which require the results of such

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(Footnote continued from preceding page)

struction given to minors of like age and attainments at the public schools of the city or district where the minor resides.

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"3. Courses of study. a. (1) The course of study for the first eight years of full time public day schools shall provide for instruction in at least the twelve common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training, the history of New York State and science. (2) The courses of study and of specialized training beyond the first eight years of full time public day schools shall provide for instruction in at least the English language and its use, in civics, hygiene, physical training, and American history including the principles of government proclaimed in the Declaration of Independence and established by the constitution of the United States."

[1] The New York State Commissioner of Education predicates his jurisdiction over the nonpublic schools on this statutory authority, which was originally derived from N. Y. Consolidated School Law, Ch. 555, Title 1, §6, Laws of 1864. See, App. 86a.

tests to be reported to the Education Department.[1] In addition, various reports are required from nonpublic as well as public schools, all of which procedures and devices have the purpose of making sure that the minimum State educational standards are maintained throughout all the schools in the State.[2]

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[1] Answers to Interrogatories of N. Y. State Commissioner of Education (See, App. 85a).

[2] The variety of evaluation and reporting services required of nonpublic schools was certified by the N. Y. State Commissioner of Education (See, App. 85a) as follows:

What They Do

1) PEP testing.

2) Regents examinations for those schools offering a Regents diploma, plus equivalent examinations for such areas in which Regents exams are not offered.

3) Periodic examinations for the evaluation of the progress of students.

4) Transfer records certifying grade record.

5) Health records for transfers.

6) Basic Educational Data System.

Every nonpublic school known to the Education Department is required each fall to file a statistical report entitled "Basic Educational Data System—Report of Nonpublic Schools" (copy attached). This report includes various kinds of information including:

a) Counts of full and part-time professional staff in four categories (principal, supervisors and department heads, classroom teachers, other instructional staff);

b) Pupil enrollment by grade and within ethnic categories;

(Footnote continued on following page)

(Footnote continued from preceding page)

c) Times of daily operation by grade;

d) Number and distribution of graduates in the previous June (secondary schools);

e) Number of dropouts;

f) Age of main building and major additions;

g) Number and types of instructional rooms;

h) Curricula offered;

i) Incidence of special instructional procedures such as programmed instruction, simulation or gaining, multimedia instruction, etc.;

j) Participation in specially funded projects such as those under ESEA Title I.

7) Data from Registered Nonpublic Secondary Schools.

Every registered nonpublic secondary school is required to file each fall with the Bureau of Secondary School Supervision a form entitled "Secondary School Report" (copy attached) which includes the following additional kinds of data:

a) Number of days in session and school calendar information;

b) Number of graduates qualified for Regents diplomas (previous June) and distribution of graduates by major three-year sequence;

c) Class size and average daily pupil load data;

d) Names, titles and salaries of administrative and supervisory personnel;

e) Counts of ancillary staff such as librarians, guidance counselors, psychologists, nurses, etc.;

f) Counts of professional staff qualified and not qualified for State certification;

(Footnote continued on following page)

As noted by the New York State Commissioner of Education,

> ". . . [A]ll the services rendered by nonpublic schools in connection with the maintenance of said minimum State standards are 'provided for or required by law or regulation'."[3]

(Footnote continued from preceding page)

g) Counts of nonprofessional staff;

h) Tuition charges;

i) Subject and unit requirements for graduation;

j) Standardized tests employed;

k) Types of audio-visual equipment.

8) Health service records.

9) Examinations for students not qualifying for a Regents diploma and filed for one year for inspection.

10) Attendance records.

11) A future development should be more comprehensive expenditure information and inspectorial information on nonpublic schools. The present funding for the performance of such services is not adequate to cover this area.

12) A future requirement will be to collect personnel characteristics for this system.

[3] Answer to Interrogatories of N. Y. State Commissioner of Education (App. 87a).

(b) Constitutional Precedents for Mandated Services.

(1) *Federal Precedent*

This Court a half century ago recognized the right of the individual states of the Union to impose minimum standards on the operation and educational quality of non-public schools, (*Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925) at 534[1]. As already observed, New York State has a long-standing tradition in requiring such reporting procedures and testing devices. This tradition, coupled with the broad generality of educational institutions that must comply with these requirements, are important factors which this Court found significant in upholding tax exemptions for religious and other charitable institutions in the *Walz Case, supra,* at 681:

> "The more long-standing and widely accepted a practice, the greater its impact upon constitutional interpretation. History is particularly compelling in the present case because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation."

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[1] This conclusion is implicit in the Court's opinion that "No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." Also, *Matter of Auster,* 198 Misc. 1055, (N. Y. Sup. Ct., Kings Co. 1950), aff'd 278 App. Div. 784, aff'd. 302 N. Y. 855, appeal dismissed 342 U. S. 884 (1951) where the court held that State education laws requiring the teaching of secular subjects in religious schools did not violate the First Amendment.

This historical pattern mutes any charge that the Mandated Services Act is without Constitutional basis.

(2) *New York State Precedent*—

Mandated Services Aid Is Expressly Authorized Under The "Blaine Amendment" of The New York State Constitution

The so-called "Blaine Amendment", Article XI, Section 3, of the New York State Constitution, is often cited as authority for prohibiting the expenditure of public funds in aid of denominational schools. It expressly authorizes such aid, however, . . . "for examination or inspection" . . . of such schools. These provisions have been a part of the New York State Constitution for over a century and a half.[1]

As noted by Justice Brennan in his concurring opinion in *Lemon* v. *Kurtzman* and *Earley* v. *Di Censo, supra* at 645-650, it is a well known fact that the history and Constitutional policy expressed in the Establishment Clause of the First Amendment is identical with that of the almost universal State Constitutional provisions, of which Article XI, Section 3 of the New York State Constitution is one example.

It is obvious, from this analysis of New York State's "Blaine Amendment" that New York's tradition of requiring examinations of the activities of nonpublic schools has a long-standing and firm Constitutional basis. Certainly, when viewed in the light of the State's century-old concern that children attending nonpublic schools obtain a quality education, the Blaine Amendment, rather than pro-

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[1] N. Y. Const. 1821, Art. VII, §10.

hibiting or even being silent on the question of expenditure of public funds for such purposes, expressly authorizes such aid.

3. *"Official Neutrality" Is Observed In the Administration Of The Mandated Services Act.*

The functions of reporting, taking attendance and evaluation of a student's performance are by their very nature neutral. Who can logically cast the persuasion that taking enrollment and administering State Regents examinations and other tests excessively entangles the public sector in religious activities? The State's long-standing statutory tradition to insure quality education for all children in the State can only be assured if proper reporting and evaluation programs are administered in every school. Quite properly, reimbursement for the performance of such services by the nonpublic schools is but a logical extension of this long-standing tradition to insure quality education in the nonpublic schools. Just as public funds are presently available for transportation, school lunches and health services for nonpublic school children to assure their physical well-being in attending school, so should public funds be available to evaluate the intellectual well-being of students in such schools.

Evaluation of student performance, attendance, record keeping, etc. are services clearly distinguishable from instructing students and certainly not frought with the dangers of excessive entanglement which this Court found in programs to reimburse secular instruction (*Lemon* v. *Kurtzman, supra*). Administration of any program to reimburse teachers for instructing students in secular courses necessarily entails close public surveillance of the religious institutions and the very teaching process itself, in order to reimburse the schools for just "secular" and

not "religious" teaching. The obvious danger in such a course of action is that the State might dictate the character of instructions in the parochial schools.

In sharp contrast, the administration of the Mandated Services program is by its very nature impersonal and objective. The religious persuasion of an individual in no way diminishes the neutrality of taking attendance, administering examinations or compiling records.

4. *The Mandated Services Act Will Not Cause "Political Divisiveness".*

Any concern that this ongoing program of Mandated Services Aid might produce "political divisiveness" is certainly dispelled by the fact that the reimburseable services have been a part of our educational program, both public and non-public alike, for many years. Moreover, it is significant that since the inception of this program there have been no efforts to expand upon the amount of the reimburseable payments nor has there been any political debate of any consequence over this program, either when it was initially enacted in 1970 or in the successive years when the Legislature has repeatedly voted overwhelmingly to fund this program for the same amount.

5. *The Mandated Services Act Will Not Foster A Trend Of Public Aid for Nonpublic Schools.*

The decision of this Court in *Lemon* demonstrates this Court's concern for ongoing educational programs which could jeopardize the state's neutrality with respect to religion. Certainly if limited public funds are syphoned-off to support the nonpublic schools, there is legitimate concern as to whether the government can maintain a neutral

role if it substantially subsidizes institutions whose secondary goal is to inculcate religious dogma. No such danger exists, however, under the New York State Mandated Services Act. The legislation is limited in scope, amount and impact.

The amount payable to each school for such services is limited to 25¢ a day per student and only 15¢ a day for students in grades one through six. The reimburseable services are limited to expenses incurred in reporting attendance and evaluation of student performance. The interrogatories of the Education Department, which are part of the record, demonstrate that the total cost for such services in all non-public schools in the State exceeds the reimbursement provided under this act.[1]

However, the Education Department has concluded that any attempt to project substantially higher appropriations would require further research and data reliability beyond which the present appropriation is based (See App. 85a).

The action of the Legislature in maintaining this appropriation at a constant level since the inception of the program and in devising other programs, rather than expanding mandated services, to aid nonpublic schools clearly establishes that the Legislature recognizes that the parameters of this program have been drawn and are limited to $28,000,000.

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[1] A cost analysis for mandated services was performed by three research Consultants engaged by the New York State Education Department in 1970 (See App. 85a). Operating independently, the Consultants reported findings which substantiate that the $28 million appropriated to reimburse the nonpublic schools for providing reporting and evaluation services is less than the actual costs of such services. Also, see finding of Justice Palmieri, dissenting in this case (342 F. Supp. 445).

Obviously, this minimal amount of aid, in relation to the total amount of State aid for education each year—2.5 Billion dollars—, is limited in its impact on individual schools. Fifteen cents or 25¢ a day per pupil is scarcely an incentive to the opening of additional nonpublic schools. Moreover, the amount of aid is probably too little and too late to reverse the inexorable trend of school closing which has been prompted in the last few years by spiralling costs of education. The key to this legislation, however, is that it could prevent a precipitous closing of nonpublic schools. With this aid the trend would be at a pace consistent with the ability of the public schools to more readily absorb the nonpublic school children.

ARGUMENT II

The mandated services aid is necessary to avert a fiscal crisis in financing education and other governmental services in New York State.

During the 1970-71-72 legislative sessions, the New York State Legislature devoted particular attention to a matter of vital importance to every citizen in the State of New York—how to finance a quality education for every child in the State.

Article XI, Section 1 of the New York State Constitution charges the Legislature with the responsibility for ". . . the maintenance and support of a system of free common schools, wherein all the children of this State may be educated." For the past several years the State Legislature has been confronted with a crisis in financing the education of its children. During this period approximately 4 million pupils have been in attendance yearly in the public and nonpublic schools of the State.

The cost to the State of financing public education has risen to about $2.5 billion in 1972-73, an increase of almost $500,000,000 since 1969-70, while local school district contributions increased by a commensurate amount.

Approximately 750,000 children, 18% of all students, are currently attending State chartered and regulated, nonpublic schools at practically no cost to the taxpayer. Greatly increased costs for parents at these nonpublic schools, coupled with the ruinous inflation of recent years and ever rising taxes to support government operations at all levels, including education, threaten a precipitous collapse of the nonpublic school system with catastrophic consequences on the public sector.

Particularly affected are city school districts often characterized by overcrowded and outdated school buildings, unsatisfactory pupil-teacher ratios and hampered by constitutional tax limits in raising funds for education. Indeed, most of these school districts have little tax margin remaining. The Table below demonstrates the relationship between remaining property tax leeway, the number of nonpublic school children and the local amount from their major source of revenue that would be available to support an influx of nonpublic students into the public schools.

PROPERTY TAX REVENUE REMAINING UNDER CONSTITUTIONAL LIMITS FOR THE SUPPORT OF EDUCATION IN SELECTED CITIES[1]

City	*1971-72 Property Tax Margin Remaining*	*1970-71 Nonpublic Enrollment*	*Amount available per pupil at local level if all nonpublic pupils were transferred to public schools*
Auburn	$ 254,122	1,709	$148.69
Binghamton	175,826	2,505	70.19
Buffalo	5,528,877	32,353	170.89
Jamestown	36,826	535	68.83
New York	1,400,187	399,615	3.50
Niagara Falls	1,118	3,430	.32
Rochester	2,835,858	14,986	189.23
Syracuse	3,798	9,640	.39
Troy	896,628	3,325	269.66
Utica	664,116	5,402	122.93
Yonkers	—0—	9,946	—0—

The above city school districts have within their geographic boundaries more than 60% of all nonpublic school pupils in New York State. It is readily demonstrated from the above Table that the ability of those school districts to finance even the local share of education costs (average of $750 per pupil) would be well-nigh impossible

[1] Table and informational data in this Argument II are derived from 1972 Report of New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education, Chapter V—Aid to Nonpublic Schools.

if these students should transfer in any substantial numbers. In fact, the Table demonstrates that even a small number of tranfers in certain cities—New York City, Niagara Falls, Syracuse and Yonkers—could constitute financial disaster for those areas.

The average operating costs for each public school child in New York State is approximately $1400 per year. Indeed we could argue that the magnitude of that expenditure—the highest in the national—was made possibly only by the willingness of the parents of nonpublic school children to bear an enormous tuition burden for the education of almost 750,000 children in addition to their normal tax load. Of course, the presumption here is that tax dollars are limited; and thus, the fewer the pupils, the more that can be spent on a per pupil basis for public education. This presumption is real and the financial crises that would be precipitated by attempting to maintain the present per pupil expenditure, should there be a collapse of nonpublic education, would be of shocking proportions. Consider, for example, the over $1 billion additional annual operating cost that would be necessary, and the estimated $1.4 billion added expenditure necessary to finance capital structures capable of handling this influx of children.

The enormity of such a fiscal nightmare can only be placed in perspective when one considers that this is $600,000,000 more than the entire revenue currently generated by the State sales tax and would necessitate almost doubling the State income tax. Can a State which has balanced its current budget on *anticipated* Federal revenue sharing of $400,000,000 and whose tax burden is among the highest in the country be expected to meet this added fiscal burden? Should local school districts relying on a regressive property tax, already at the confiscatory level, be asked to assume that burden? The answer is obvious. Survival of quality education is at stake.

No one will deny New York's constitutional authority to mandate certain minimal services, tests, record-keeping, health services, attendance requirements and the like in the nonpublic schools within its borders. It has done so for many years without challenge and without cost to the taxpayer.[1]

In recent years, due to inflation, labor costs and the overall increased costs of producing quality educational services in the nonpublic schools, these schools were no longer able to financially comply with the additional costs of providing for the State the required reporting and record-keeping of these mandated services. Because of this increased financial burden imposed by the State, many nonpublic schools had begun to reach the breaking point and were about to be forced to close their doors.

The Legislature, recognizing the impending calamity it was faced with, had the choices of either letting the nonpublic schools close, or eliminating the programs of mandated services, or assisting the nonpublic schools financially for their out-of-pocket expenses incurred in complying with these State mandates. The Legislature chose the latter course.

It seems anomalous to say that the Legislature can direct these private nonpublic schools to perform certain services for the State but not be able, constitutionally, to reimburse them partially for the costs of performing these services. Yet that is the substance of the decision below. Indeed, it would appear to be more of a constitutional deprivation for the State to mandate these services

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[1] This Court a half century ago recognized the right of the individual states of the Union to impose minimum standards of educational quality and operation on the nonpublic schools. (*Pierce* v. *Society of Sisters*, supra, at 534).

by private institutions without just compensation rather than for the State to reimburse them for these services.

This Court would do well to heed the advice of Professor Paul Kauper, an eminent constitutional lawyer, who concluded his lecture on "Government and Religion, the Search for Absolutes" (published in *Michigan Law Quadrangle Notes*, Vol. 15), as follows:

> "In short, the courts may in an appropriate gesture of modesty recognize that they do not have all the wisdom in these matters; that there is latitude for some play in the joints; and that in the area of church-state relations as in all other areas of public concern where policy considerations loom large, it is not inappropriate to leave the determination of some issues to the operation of the democratic process."

Perhaps, the time has arrived for the resuscitation of the doctrine of "judicial self-restraint" in this area of the law, in order to leave room for states to experiment with devising more effective methods of educational achievement which is more apt to arise through competition between schools rather than by elimination of the nonpublic schools from the scene.

ARGUMENT III

Legislative bodies and political institutions should not be curtailed in their constitutional right to a free and open debate of issues of a peculiarly volatile nature.

The exercise of such fundamental rights as Freedom of Speech and Expression and the reserved sovereign powers of the states are endangered by the opinion of the Federal District Court in this case.

Traditionally, state legislative bodies and other political institutions have exercised the right to free and open debate of any subject or issue, no matter how politically divisive it may be on segments of our society.

The exercise of this right appears to have been curtailed by recent federal court decisions involving issues similar to those in this lawsuit. Those decisions have expressly, and by innuendo, curtailed the rights of state legislative bodies to freely and openly debate issues which are "potentially divisive." The basis of these federal court devisions is the opinion of this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). In that case it was observed that:

> "Ordinarily, political debate and division, however vigorous or even partisan, are normal manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.
>
> "The potential divisiveness of such conflict is a threat to the normal political process."

This Court issued this pronouncement in declaring unconstitutional a Pennsylvania law providing public funds for teaching nonreligious courses in private schools. In so ruling the Court acknowledged its chief concern was not whether the law aided religion, but that it involved "excessive entanglement" of religion in government. Such entanglement, this Court concluded, violated the First Amendment provision of separation of church and state. This Court implied that excessive entanglement exists in the normal political activity of our legislative bodies when considering issues which peripherally touch upon a religious question.

This Court's reaction to entanglement of religion and government cannot be taken as a "passing fancy:" In recent months other Federal courts have relied upon the pronouncement in the *Lemon* case to curtail efforts by various legislative bodies throughout the country to seek solutions to the fiscal plight of nonpublic schools.

For example, in March 1972 a three-judge Federal Court declared unconstitutional a Vermont law which partially reimbursed public school teachers for teaching nonreligious courses in parochial schools. (*Americans United for Separation of Church and State* v. *Oakey,* 339 F. Supp. 545 (D.C. Vt. 1972). The court noted (at 545):

> "Any such involvement carries with it the explosive potential for citizen friction and political subdivision along religious lines."

Similar restrictions on the freedom of state legislatures to debate issues involving religious overtones was evidenced in the month of March 1972 when federal courts sitting in Pennsylvania and Ohio struck down laws reimbursing parents for children's tuition payments in private schools. (See *Lemon* v. *Sloan,* 341 F. Supp. 1356 (D.C. Pa. 1972); *Wolman* v. *Essex,* 342 F. Supp. 399 (E.D. Ohio 1972)). Particularly significant is the decision of the federal court in Ohio, which states, in part, that the plan

> ". . . contains the seeds for increased political involvement along religious lines at every level of government. . . . To uphold this statute would be to introduce the religious issue to the very center of state politics . . . the political issue will be an expansive one . . . with the result that the issue will be joined along sharply drawn religious lines."

The two judges of the Federal District Court in this case have likewise implied that restrictions are imposed

on the freedom of the state legislature to debate legislation touching on religious issues. The majority decision noted (342 F. Supp. 439):

> ". . . it is reasonable to assume that state assistance will result in the aggravation of divisive political activity on the part of supporters and opponents."

The pronouncement of this Court in the *Lemon* case, as applied in this line of recent Federal cases, has been resorted to with devastating consequences. Underway is a dangerous trend to restrict the freedom historically enjoyed by the New York State Legislature and other legislative bodies to respond to diverse problems, which by necessity demands free and open discussion of every conceivable issue. As noted by Judge Edmund L. Palmieri in his dissent in this case:

> [Government and political activity should play a part in searching] ". . . for ways within the American system of public education that will preserve, indeed promote, the diversity of individual belief—religious, political and social—that, along with our Bill of Rights, distinguishes us so plainly from certain uniform, unified and uni-governed societies elsewhere in the world."

In the event that this trend to curtail legislative debate is continued, no longer will legislative bodies operate as a forum for free and open discussion. Indeed there is a danger that the resolution of peculiarly volatile issues will no longer continue within the framework of our democratic process. It is submitted that the unfortunate trend that may develop from these recent federal court decisions is to encourage elements of our society to seek

solutions to our social, political and economic problems in a manner that is "extra-legal."

The courts of the United States have attempted to exercise a jurisdiction so large and so great in terms of breadth and width that sometimes members of the judiciary lose track of the fact that the Federal Government is not the paramount body in the United States of America. In the Federal Government and its Judiciary does not repose the sovereignty, except to the extent that the states have given it to them. The sovereignty of the individual and of the states under the reserved powers concept (U. S. Constitution Articles IX and X) reposes not there but with the states, and the fact that the states do have this residuum of sovereignty makes theirs the responsibility of preserving that which remains.

It is beyond the authority of the courts of the United States to dictate to the sovereign legislatures of the several states the parameters of its debate. In giving birth to our Federation, the several states allowed and authorized the courts of the United States to pass upon the constitutional issues of the final product, the statutes which are enacted. But no where can be found the authority for the courts to dictate that which would be the subject of colloquy.

CONCLUSION

The Final Report of the President's Panel on Nonpublic Education (U.S. Gov. Print. Office, Stock No. 1780-1972) made the following pertinent observations, at pages 28-29, concerning this Court's decision in *Lemon* v. *Kurtzman*:

> "In the Panel's view the full Court had an inadequate perception of realities in parochial schools

because it failed to pierce the institutional veil. The entire focus was on the powers of the hierarchy, the role of the pastors, and the teaching commitment of religious; ignored were parents, teachers, and pupils who are now cut off from certain forms of public assistance.

"Others have launched sharper critiques. One such criticism holds that, by judicial fiat, there is now a virtual disenfranchisement of religiously committed people with respect to public policy questions about which their churches have a strong position. They ask whether the civil rights of Lutherans or Jews or Quakers are to be suppressed under the guise of 'no religious division' in the same way that the Civil rights of Negroes were curtailed by a Supreme Court ruling (*Plessy* v. *Ferguson,* 1896) that 'separate but equal' treatment was necessary for peace and order. Finally, it might be noted that some constitutional lawyers feel the time has come to challenge the denial of benefits to non-public school students on grounds that educational appropriations are public welfare benefits which should not be restricted by religious conditions. The challenge should be mounted.

"Whatever legal opinions are involved, the Panel shares Mr. Justice White's minority statement that not only has the majority decision ignored the evidence in the Rhode Island case ('on this record there is no indication that entanglement difficulties will accompany the salary supplement program') but that—

'The Court thus creates an insoluble paradox for the State and parochial schools. The State

> cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught . . . and enforces it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence.'
>
> "Repercussions from this decision have been many. Michigan, Connecticut, and Ohio had plans to use State funds for teacher salary supplements, which have now been thwarted; plans for purchase of secular educational services in Illinois and New York have similarly fallen. Still to be decided are Maryland's scholarship plan, tax credit plans in Minnesota and Hawaii, and Illinois' multiple approach, which includes tuition vouchers for inner-city nonpublic school pupils.
>
> "In summary, the law is still being molded and shaped by both judicial philosophies and political events so that the final phase in the Federal drama over nonpublic school education is still to be enacted."

It is submitted that Chapter 138 of the 1970 Laws of New York is such a constitutional enactment, consistent with and in response to the guidelines set forth by this Court and the United States Constitution.

We contend that the majority decision of the District Court in this case fails to recognize the authority of the several states, under our Federal System, to legislate with respect to nonpublic school education. Accordingly the

judgment of the District Court should be reversed and Plaintiffs' complaint dismissed on the merits.

Dated: December 15, 1972.

Respectfully submitted,

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